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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1880

THE CHICAGO PATROLMEN'S ASSOCIATION, A NOT-FOR-PROFIT CORPORATION, IN BEHALF OF VARIOUS MEMBERS OF THE CHICAGO POLICE DEPARTMENT and RICHARD GAFFNEY, BERNARD B. O'REILLY and ROBERT A. ROSSI, MEMBERS OF THE CHICAGO POLICE DEPARTMENT,
Petitioners,

vs.

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION, and DAVID STAHL, CITY COMPTROLLER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The order of the Circuit Court of Cook County is reproduced in Appendix B to the Petition. The opinion of the Supreme Court of Illinois is reproduced in Appendix A of the Petition and is reported at 56 Ill. 2d 503.

JURISDICTION.

The jurisdictional requisite is incorrectly set forth in the Petition. The Petition invokes the jurisdiction of this Court pursuant to 28 U. S. C. § 1254 which provides for the review of decisions of federal courts of appeal. For purposes of this Brief, Respondents will treat the Petition as if jurisdiction of the Court had been invoked pursuant to 28 U. S. C. § 1257(3).

QUESTION PRESENTED.

Whether Petitioners are entitled to step and longevity increases for the year 1972 which were not provided for in the 1972 budget of the City of Chicago.

STATEMENT.

It is not disputed that for a number of years prior to 1972, civil service personnel of the City of Chicago were paid pursuant to an annual appropriation ordinance passed by the City Council of the City of Chicago. These annual ordinances provided for specific starting wage scales each year for various job classifications within the civil service system, for various step increases within the job classification based upon months of service within each classification and for additional longevity increases for individual members of the civil service after they reached a maximum pay range within their classification. Such a plan was adopted and appropriated for by the City Council in the appropriation ordinance for 1971.

The step and longevity increases were granted and paid for the year 1971 to those employees who qualified for said increases up to August 15, 1971. On that day, the President of the United States, pursuant to the Economic Stabilization Act of 1970 (P. L. 91-379, 84 Stat. 799) issued Executive Order No. 11615 which froze all prices, rents, wages and salaries for

a period of 90 days, thereby preventing those qualifying for the step and longevity increases as of August 15, 1971 from being paid the increases.

On October 15, 1971, the President issued an Executive Order establishing Phase II of the wage price freeze and the Cost of Living Council. The cost of Living Council set forth guidelines which limited any salary increase to no more than 5.5%. On December 10, 1971, the City Council passed its 1972 appropriation ordinance, and in keeping with the dictates of Phase II, increased the salaries of civil service employees by 5 to 5.5% based on the salaries they received in 1971. There was no appropriation for step and longevity increases for 1972.

On January 13, 1972, the President issued an Executive Order, and on January 27, 1972 the Pay Board issued regulations pursuant to the Economic Stabilization Act which permitted the retroactive payment of increases scheduled to be paid during Phase I pursuant to a pay practice established prior to the inception of Phase I. On February 2, 1972, the City, upon receiving an official ruling regarding the President's Order and the Pay Board's regulation, paid in a lump sum all step and longevity increases that were scheduled and appropriated for payment under the 1971 appropriation ordinance and which had been frozen by Phase I. Since there was no appropriation for step and longevity increases for 1972, no such increases were paid.

The instant case, a class action, was commenced by the filing of the complaint in the Chancery Division of the Circuit Court of Cook County, Illinois, on January 25, 1972. Plaintiffs (Petitioners) represented members of the Chicago Police Department with forty-two months or less at the time of the filing of the complaint.

The complaint contained one count sounding in contract and another count seeking relief on an estoppel or quasi-contract theory. The relief sought included an order directing Respondents to pay to Petitioners accrued step and longevity increases for

1971 and 1972 step and longevity increases to which Petitioners alleged they were entitled.

On November 3, 1972, the trial court entered an order striking that portion of the complaint pertaining to 1971 step and longevity increases as moot since these increases were granted after the filing of the suit. Respondents filed their answer and both parties moved for summary judgment. The trial court granted Petitioners' motion for summary judgment and ordered the Respondents to pay step and longevity increases for 1972 to every member of the Chicago Police Department entitled to such increases and to include the period of time from August 14, 1971 to December 31, 1972 in determining the step and longevity position of each member of the Chicago Police Department. Respondents filed notice of appeal to the Illinois Appellate Court and on June 14, 1973, Justice Thomas E. Kluczynski entered an order transferring the cause to the Supreme Court. The Illinois Supreme Court held that in the absence of an appropriation, the Petitioners were not entitled to step and longevity increases for 1972 and remanded the cause to the Circuit Court with directions to dismiss the action.

REASONS FOR DENYING THE WRIT.

There is no special and important reason presented in the Petition to warrant review by this Court on certiorari. The Illinois Supreme Court has not decided a federal question of substance, but rather, has based its decision in this case on well-established principles of Illinois law.

I.

No Substantial Federal Question Was Raised in a Proper and Timely Manner in the Illinois Courts.

Petitioners present four reasons why a writ of certiorari should issue to review the judgment and opinion of the Illinois Supreme Court: (1) Chapter 24, paragraph 8-1-7 of the Illinois

Revised Statutes is, as applied to the Petitioners, unconstitutional, as a violation of the constitutional provision forbidding the impairment of contracts; (2) the City's failure to grant to Petitioners step and longevity increases for 1972 deprives them of due process of law; (3) the City's failure to grant to Petitioners step and longevity increases for 1972 amounts to a denial of equal protection of the law; (4) the Illinois Supreme Court has violated the Illinois Civil Practice Act.

Petitioners have failed to comply with Rule 23(f) of this Court which provides that if a review of the judgment of a state court is sought, the statement of the case must specify the stage in the proceedings in the court of the first instance and in the appellate court at which the federal questions sought to be reviewed were raised. It is essential to the jurisdiction of the Supreme Court under 28 U. S. C. § 1257 that a substantial federal question have been properly raised in the state court proceeding. *Godchaux Co.* v. *Estopinal,* 251 U. S. 179 (1919).

The record clearly indicates that the issues in this case consistently have been framed in terms of the Petitioners' rights under Illinois law. In the complaint, Petitioners based their right to step and longevity increases on the basis of a contract, or in the alternative, a promissory estoppel theory. The complaint contained no reference to any provision of the United States Constitution. The decision of the Circuit Court of Cook County was based entirely on that court's interpretation of Illinois law. After determining that the 1972 budget provided for sufficient funds to pay the sought after increases, the trial court held that the Petitioners were entitled to said increases on a general detrimental reliance theory (Petition, Appendix B, page 7a). Similarly, Justice Walter V. Schaefer, who delivered the judgment of the Illinois Supreme Court, based the opinion entirely on Illinois substantive law when he ruled that in the absence of an appropriation, Petitioners were not entitled to step and longevity increases. No federal question was considered.

An examination of the record reveals that Petitioners completely failed to raise grounds one and four of their Petition in any Illinois proceeding. At no point did Petitioners allege that Chapter 24, paragraph 8-1-7 of the Illinois Statutes is unconstitutional as applied in this case. In addition, Petitioners raise here for the first time the applicability of the Illinois summary judgment law to the proceedings. It is essential that any issue sought to be reviewed on writ of certiorari have been presented to the state court with fair precision. It is well settled that issues which are not raised in the state court proceeding are not open to question on petition for certiorari. *Ellis* v. *Dixon,* 349 U. S. 458 (1954). In the instant case, Petitioners' issues one and four were never raised prior to the filing of the Petition. Moreover, Justice Schaefer's opinion never considers these or any other federal issues, but deals only with the Illinois law which is applicable to the case. If the state court does no more than discuss the interpretation of state law or statutes, without considering such interpretation in the light of federal issues, the Supreme Court cannot consider the federal points. *Beck* v. *Washington,* 369 U. S. 541 (1961).

Points two and three, based on the due process and equal protection guarantees of the Constitution, were not relied upon in Petitioners' complaint as requiring the payment of step and longevity increases. Rather, the theory of the pleadings was based on Illinois contract and quasi-contract law. Due process and equal protection issues were briefed in the Illinois Supreme Court, but that court did not consider these questions. The Petition fails to show that Petitioners properly raised due process and equal protection issues in the trial court.

The Illinois rule is that it is the duty of a person, whenever he regards his constitutional rights as invaded, to object at the earliest fair opportunity, and the failure to do so amounts to a waiver of the right. *Pennsylvania R. Co.* v. *Illinois Brick Co.,* 297 U. S. 447, 462-3 (1935); *Hulbert* v. *Chicago,* 202 U. S. 275, 80 (1905); *Jewel Tea Co.* v. *Rowe,* 414 Ill. 495 (1953).

Where the state high court is silent on the federal question, it may be assumed, unless the Petition affirmatively shows otherwise, that the silence is due to a procedural deficiency. *Bailey* v. *Anderson,* 326 U. S. 203, 206-7 (1945). Absent such a showing here, it may be assumed that the federal issues were not properly raised at the trial level and therefore were not considered by the Illinois Supreme Court. This is fatal to review of any of the issues in this forum. *Id.* Moreover, it appears that Petitioners' fourth issue, whether the Illinois Supreme Court properly applied the state summary judgment procedure, is essentially an issue of state law of which the Illinois Supreme Court is the final arbiter.

II.

The Decision of the Illinois Supreme Court Is Based on Nonfederal Grounds.

It is a familiar rule that where the decision of the state court is deemed to rest upon a nonfederal ground which adequately supports the state court judgment, such state court judgment is not open to review by the Supreme Court. *Murdock* v. *Memphis,* 20 Wall. 590, 22 L. Ed. 429 (1874). Even if a federal claim was properly asserted, if the state Supreme Court decides the case entirely on a nonfederal ground, the decision on nonfederal grounds is a bar to further review by this Court. *Wood* v. *Chesborough,* 228 U. S. 672 (1913). There must be a substantial basis for the state court ruling, and consistency with prior decisions is a good indication that the opinion is based on sufficient state grounds so as to preclude review in the Supreme Court. *Fox River Paper Co.* v. *Railroad Comm's,* 274 U. S. 651 (1926).

The Illinois Supreme Court's holding that Petitioners have no enforceable right to step and longevity increases for 1972 is based on well-established Illinois law. As Justice Schaefer commented, "The controlling legal principles are familiar."

(56 Ill. 2d at 507, Petition, page 5a.) Justice Schaefer then ably summarized the statutory and case law which governs the right of municipal employees to salaries over and above those that are appropriated. It is respectfully submitted that the decision of the Illinois Supreme Court is based on adequate nonfederal grounds. It is clearly correct and is consistent with a long line of Illinois decisions which deal with the same issue. Therefore, there is no useful purpose to be served by review of the case by this Court.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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